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NOV 07 2001

Missouri Public
Service Commission

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November 7, 2001

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Union Electric
Case No. EO-2001-684

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **REPLY BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL**. Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "John B. Coffman".

John B. Coffman
Deputy Public Counsel

JBC:jb

cc: Counsel of Record

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

FILED²

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Missouri Public
Service Commission

In the Matter of the Application of Union)
Electric Company d/b/a AmerenUE for an)
Order Authorizing It to Withdraw from)
the Midwest ISO to Participate in the)
Alliance RTO)
)

Case No. EO-2001-684

REPLY BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

John B. Coffman (#36591)
Deputy Public Counsel

November 7, 2001

In this reply brief, the Office of the Public Counsel (Public Counsel) will address arguments made by Union Electric Company d/b/a AmerenUE (Company) in its Initial Brief of Union Electric Company (Company Brief) in support of its application to withdraw from the Midwest Independent System Operator, Inc. ("Midwest ISO" or "MISO") and to join the Alliance Regional Transmission Organization ("Alliance RTO" or "ARTO"). Some arguments made by Company have already been sufficiently addressed by the Public Counsel in the Initial Brief of the Office of the Public Counsel (Public Counsel Brief). Any failure to address Company arguments in this reply brief should not be construed as acceptance or acquiescence.

This reply brief will explain Company's failure to prove how its proposal to join the ARTO will not create detriments to the rates and service quality of Missouri electric consumers. In fact, almost every contention made in Company's Brief regarding the future operation of the ARTO is based on **speculation** about future events. While the independent governance of the MISO has now received ISO approval from the Federal Energy Regulatory Commission (FERC), the ARTO continues to violate FERC orders and continues to make market decisions that threaten the development of an independent wholesale electric markets.

I. ARGUMENT

A. Company has utterly failed to meet the burden to prove that its proposal to switch ISO/RTO membership will produce no detriments to the public interest.

Because the Commission is being asked to make a decision about whether withdrawing from the MISO and joining the ARTO is in the public interest at this moment, the Commission

must examine the status of these two entities as they are currently structured. The Commission cannot base its decision in this case upon speculation about future changes to the ARTO.

Company's Brief claims that its participation in the ARTO would not be detrimental to the public interest because the "quality of transmission service that the customers of the Company will receive from the Alliance RTO will be no different from the quality of transmission service they would receive from the Midwest ISO." Ibid., pp. 1, 4-5. This is pure speculation, as there is currently no assurance regarding the quality of ARTO's transmission service. The record in this case contains no evidence that the ARTO will have reliable transmission service and the Company does not provide any citation to support this contention. In fact, Company witness Whiteley admitted that security coordination systems for the ARTO are not currently in place. (Tr. 92, 100). Security coordination is a core function of a properly functioning RTO and a key determinant of quality transmission service. Simply put, there is not yet any reliable plan to keep the lights on.

On page 4 of Company's Brief, Company makes another broad statement that is not based upon current facts: "It is undisputed that the functions, characteristics and responsibilities of the for-profit Alliance RTO will be identical to the not-for-profit Midwest ISO since they have been mandated by FERC Order No. 2000." This statement is in dispute. This statement is based upon the speculation of its witness in this case about future FERC decisions and interpretations. The ARTO, unlike the MISO has not been approved by FERC to oversee regional transmission responsibilities. The ARTO has not yet been able to demonstrate that it has the ability to perform the same functions such as security coordination that the MISO has been able to demonstrate. The record indicates that security coordination systems for the ARTO are not currently in place (as they are for the MISO). (Tr. 100). Furthermore, it is Public Counsel's

contention that the ARTO cannot meet the same responsibilities that the MISO meets, because the ARTO's market design has been set up by a non-independent entity without any meaningful stakeholder input.

A complete misunderstanding of the burden of proof in this case is evident from page 5 of Company's Brief, where Company states that Public Counsel witness Kind failed to identify "any advantages that Company's customers would see if the Company were to remain in the Midwest ISO," and further states that this "is compelling evidence that there are none." Ibid., p. 5. First of all, Mr. Kind did explain at the hearing that, if Company joins the ARTO, consumers would experience higher bills as a result of a wholesale market that functioned poorly. (Tr. 207-208). Moreover, it is Company that bears the burden of proof in this case, not Public Counsel. Company's Brief acknowledges this on page 20. In order to prevail, Company must prove that its proposal would produce no detriments to the public, a burden that it has failed to meet based upon the record in this case.

Company points to recent filings it has made with the FERC to support the contention that the ARTO has not violated FERC Order 2000 through its various business decisions. Company's Brief, p. 16. It should be noted that the issue of whether the ARTO has violated FERC orders is still being litigated, and awaiting a final determination.

Company argues that its participation in the ARTO would allow it to retain more open access transmission revenues than it is allowed to retain in the MISO, and that as a result, its bundled retail customers will benefit from "the lowering effect." Company's Brief, p. 5. This impact on future retail rates is pure speculation. Not surprisingly, the record shows that Company's strategy to "get out of MISO" was driven, not by a concern for how transmission revenues impacted ratepayers, but rather out of a desire to retain those transmission revenues for

its shareholders. (Ex. 5P, Att. RK-1 through RK-6; Ex. 6HC, pp. 9-3; Tr. 223-224). In fact, Company has taken several steps in the past year to prevent *any benefit* of a change in its transmission revenues from flowing through to consumers. (Ex. 5, pp. 9-10; Tr. 151-153). The Commission cannot speculate that possible benefits of transmission revenue retention will flow through to consumers unless Company can commit to such a flow-through. As Staff points out, any such possible benefit to consumers is impossible to determine and is based upon many assumptions. Initial Brief of the Staff of the Public Service Commission, pp. 9-11. The Company does not point out that, even if the speculative benefits did flow through to ratepayers, this would only occur during the brief transmission period when the proposed revenue retention rate design is in place. Moreover, any such benefit would be eclipsed by the detrimental impact on retail rates that would result from the dysfunctional wholesale electric market created by Company's participation in the Alliance RTO. (Ex. 3, p. 32-39; Tr. 208).

Company's Brief attempts to discount testimony regarding the public detriment of the ARTO's energy balancing presented by Staff witness Proctor and by Public Counsel witness Kind, stating that these witnesses were merely referring to "a proposal, not a final decision." Ibid., p. 17. However, the ARTO's current non-independent governance has submitted its tariff regarding energy imbalance service (without stakeholder input) to the FERC seeking approval. The ARTO clearly hopes that its energy balancing proposals are adopted as submitted and become final. In deciding this case, the Commission cannot speculate about whether the FERC might force a change in this proposal.

Company's Brief essentially admits that the ARTO's non-independent governance has already made two other decisions (also without stakeholder input) that would create a detriment to the public—the selection of a market monitor and the development of a pro forma

interconnection agreement. Ibid., p. 18. The fact that the ARTO is making market sensitive decisions without independence and without stakeholder input is prima facie evidence that Company's membership in this organization would be detrimental to the public interest. In order to operate efficiently, markets need trust in the fairness of market institutions. Trust in the fairness of the ARTO's governance has seriously eroded among potentially affected stakeholders. It would be pure speculation to suggest that the ARTO will develop an independent governance and that the related public detriments will somehow be erased in the future.

In order to understand how crucial the principle of independence is to the development of a properly functioning wholesale electric market, the following excerpts from FERC Order 2000 are helpful:

In the NOPR, the Commission expressed its belief that there remain important transmission-related impediments to a competitive wholesale electric market. The Commission grouped these remaining impediments into two broad categories: (1) the engineering and economic inefficiencies. . . , (2) continuing opportunities for transmission owners to unduly discriminate in the operation of their transmission systems so as to favor their own or their affiliates' power marketing activities. Ibid., p. 32.

. . .

when utilities control monopoly transmission facilities and also have power marketing interests, they have poor incentives to provide equal quality transmission service to their power marketing competitors. Ibid., p. 35.

. . .

instances of actual discrimination may be undetectable in a non-transparent market and, in any event, it is often hard to determine, on an after-the fact basis, whether an action was motivated by an intent to favor affiliates or simply reflected the impartial application of operating or technical requirement. Ibid., p. 36.

. . .

It the market participants perceive that other participants have an unfair advantage through their ownership or control of transmission facilities, it can inhibit their willingness to participate in the market, thus thwarting the development of robust competition. The NOPR added that such mistrust can also harm reliability. Ibid., p. 37.

. . .

. . .vertically integrated utilities have the incentive and the opportunity to favor their generation over those of their competitors. Ibid., p. 66.

. . .

. . .perceptions of discrimination are significant impediments to competitive markets. Efficient and competitive will develop only if market participants have confidence that the system is administered fairly. Lack of market confidence resulting from the perception of discrimination is not mere rhetoric. It has real-world consequences for market participants and consumers. As stated by NERC, there is a reluctance on the part of market participants to share operational real-time and planning data with transmission providers because of the suspicion that they could be providing an advantage to their affiliated marketing groups, and this can, in turn, impair the reliability of the nation's electric systems. Ibid., p. 69.

. . .

In the NOPR, we repeated our earlier statement that "the principle of independence is the bedrock upon which the ISO must be built "and emphasized that this principle must apply to all RTOs, whether they are ISOs, transcos or variants of the two. Ibid., p. 193.

. . .

. . .the Commission's view that an RTO must be independent of any entity whose economic or commercial interests could be significantly affected by the RTO's actions or decisions. Without such independence, it will be difficult for an RTO to act in a non-discriminatory manner. Therefore, the definition focuses on those entities whose economic and commercial interests can be significantly affected by the RTO's behavior. Ibid., p. 195.

. . .

We affirm our belief that “[a]n RTO must be independent in both reality and perception.” . . . The DOE Reliability Task Force concluded that regional reliability entities must be “truly independent of commercial interests so that their reliability actions are – and are seen to be – unbiased and untainted.” The Electric Reliability Panel concluded that “[t]o dispel suspicions that the system operator favors one participant over another . . . the operator must be independent of market participants.” Ibid., p. 205.

. . .

Public Counsel agrees with the importance of independence for an RTO, as explained by the FERC. This is perhaps the most important factor the Commission should consider in comparing the ARTO and the MISO, but the Commission should not simply “trust FERC” to ensure independence as Company urges this Commission to do. This Commission should make its own determination regarding the independence of the for-profit ARTO transco from the perspective of Missouri consumers. The FERC perspective on independence may not be sufficiently focused on the region surrounding Company in order to protect Missouri consumers.

The MISO currently receives input from its stakeholders and this input has previously developed a more positive market design. By contrast, the ARTO has continued to make business decisions affecting that affect market design even though the ARTO is currently comprised of transmission owners whose business interests are in competitive generation and power marketing. Many of the market design decisions have been made by BridgeCo, which is an entity created by and answering to the transmission owners comprising the ARTO. (Tr. 95-96).

On July 12, 2001, the FERC expressed concern about the ARTOs compliance with FERC Order 2000, specifically expressing concern about the lack of formation of a stakeholder Advisory Committee and the lack of independent governance. On October 12, 2001, the ARTO

filed its Offer of Settlement, proposing a stakeholder process. While Company is expected to point to this offer of settlement as answering concerns regarding stakeholder input, the offer fails to address the most critical concerns of stakeholders which is that there is an independent entity to which stakeholders can provide advice. The ARTO has continued to make important business decisions without the proper oversight that a stakeholder process would have insured. The wholesale market surrounding the ARTO service area has already been tainted by these decisions, precluding market participants from developing the confidence that a market could ever develop in an independent, non-discriminatory manner under the currently proposed ARTO structure.

B. Company's after-the-fact filing of its Application in this case, combined with its legal position that the Commission is preempted from considering a case which Company committed to filing, is an affront to the Commission's authority and its responsibility to protect Missouri consumers.

Company should have filed with this Commission a notice to withdraw from the MISO at the same time it filed a notice to withdraw with the FERC on January 16, 2001. This was Public Counsel's understanding of the Stipulation and Agreement entered by the parties to Case No. EO-98-413. As this was Public Counsel's understanding, an email was sent from Ryan Kind to David Whiteley on January 23, 2001. Mr. Whiteley's response to that email was that Company's attorney was working on a filing requesting Commission approval and it was expected to be filed within a week of that email. (Tr. 85). Failure to do so is a violation of Company's commitment in Case No. EO-98-413 and violation of the Commission's Report and Order in that case. Obviously, Company recognized its obligation in January, but subsequent to its communications with Public Counsel, willfully chose to ignore that obligation. Company should suffer the consequences of its decision to delay filing the Application in this case.

The legal position Company has staked out in this case also casts a shadow on the ability to trust any commitment from this regulated utility. If Company believes that this Commission is preempted from considering the matter now before it, it should not have committed to file such a case in the Stipulation and Agreement it signed in Case No. EO-98-413. Furthermore, Company should not expect this Commission to trust statements that its proposal in this case is in the best interest of consumers. The Commission should also be wary of Company's commitment to seek Commission approvals if it ever desires to sell or divest its transmission assets to ARTO in the future. Company Brief, p. 30.

If the Commission decides to approve Company's proposal in this case, it should not do so without requiring all the requiring recommended conditions, including the condition that Company hold all Missouri ratepayers harmless from any adverse rate effects that could result from the transfer of its transmission assets to the Alliance RTO or some other entity at market value. If the Commission believes that approval of Company's proposal in this case would otherwise be detrimental to the public interest, it can, and should, condition such approval on a commitment by Company to not transfer ownership of its transmission assets, without approval by this Commission, regardless of any future changes in state law.

II. CONCLUSION

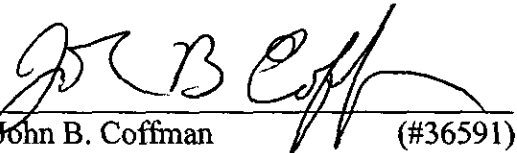
Company has failed to prove how its proposal to join the ARTO will not create detriments to the rates and service of Missouri electric consumers. Furthermore, no conditions could possibly mitigate the detriments identified on the record regarding

Company's proposal to switch its ISO/RTO participation, and thus the Commission should simply deny the Application.

The Commission must recognize its solemn responsibility to protect Missouri consumers. This Commission should not adopt Company's suggested approach to this case--"defer everything" to the FERC. The FERC has not been consistently vigilant in protecting the wholesale electric markets in certain regions of the country. Even if its OK with FERC, it may not be OK for the public interest in Missouri.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 7th day of November 2001:

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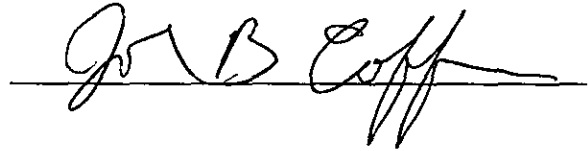
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A handwritten signature in black ink, appearing to read "David B. Hennen", is written over a horizontal line.